

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

**CELLULAR COMMUNICATIONS
EQUIPMENT LLC**

v.

HTC CORPORATION, et al.

CIVIL ACTION NO. 6:13-cv-507

CONSOLIDATED LEAD CASE

**DEFENDANTS' JOINT REPLY IN SUPPORT OF DEFENDANTS'
JOINT MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM**

Defendants in the consolidated cases file this Reply to Cellular Communications Equipment LLC's ("CCE's") Opposition to Defendants' Motions to Dismiss.¹ CCE ignores the case law mandating dismissal of its boilerplate allegations of indirect and willful infringement. Rather, CCE attempts to use its infringement contentions to fill the glaring holes in its pleadings. In addition to being deficient in other ways, however, CCE's infringement contentions offer no support for claims of *indirect* or *willful* infringement. CCE also injects new allegations through its Opposition, confirming that its First Amended Complaints ("FACs") are deficient. At a minimum, CCE's failure to sufficiently allege pre-suit knowledge of the patents mandates limiting *any* alleged liability for indirect infringement to the post-filing period.

I. ARGUMENT

A. CCE's Induced Infringement Claims Should Be Dismissed

CCE improperly attempts to introduce new allegations through its Opposition. These newly alleged facts cannot cure CCE's failure to sufficiently plead two essential elements of inducement: (1) Defendants' specific intent for a third party to infringe the asserted patents; and (2) Defendants' knowledge that the third party's acts constituted infringement.

First, CCE does not sufficiently allege intent, disregarding the *Twombly/Iqbal* requirements by claiming CCE "need not identify specific documents to prove intent." Opp. at 7. In its Opposition, CCE attempts to add new factual details that discuss the *medium* of Defendants' "instructional materials"—that Defendants "tell their customers how to use the accused products" "online" and via "manuals"—rather than *actually identifying an instruction related to the asserted patents*. CCE's threadbare allegations, however, do not permit the reasonable inference that Defendants are liable for the misconduct alleged. Second, CCE addresses the wrong issue, arguing that a "plausible inference that Defendants had knowledge of

¹ Defendant Dell Inc. filed a separate reply brief.

the *patents*” satisfies the knowledge requirement. Opp. at 7 (emphasis added). In fact, “the knowledge requirement for inducement refers to the inducer’s knowledge of the induced third party’s infringing acts, not knowledge of an inducer’s own inducing conduct.” *Compound Photonics, LTD v. Sony Corp.*, No. 6:11-cv-552-LED-JDL, slip op. at *8 (E.D. Tex. June 5, 2013). CCE’s reliance on *Achates* is misplaced. *Achates* did not hold that knowledge of the *patents* suffices, as opposed to the *third party’s acts*. Rather, *Achates* determined that the required knowledge of the third party’s acts could be inferred where the defendants’ customers were sold a product containing a component that would be ineffective in achieving its purpose if a specific, infringing customer step was not mandatory.² *Achates Reference Publ., Inc. v. Symantec Corp.*, No. 2:11-cv-294-JRG-RSP, 2013 U.S. Dist. LEXIS 27143, at *10 (E.D. Tex. Jan. 10, 2013). CCE has not alleged that the accused products contain such a critical component. Indeed, CCE’s FACs offer no description of the alleged invention, much less a description of any particular action allegedly “instructed” by Defendants and performed by their customers.

B. CCE’s Contributory Infringement Claims Should Be Dismissed

CCE ignores the *Twombly/Iqbal* requirements that contributory infringement claims must be supported with specific factual allegations. At the pleading stage, “a plaintiff must . . . plead facts that allow an inference that the components . . . have no substantial non-infringing uses.” *In re Bill of Lading Transmission and Processing Sys. Patent Litig.*, 681 F.3d 1323, 1337 (Fed. Cir. 2012). “[T]he inquiry focuses on whether the accused products can be used for purposes other than infringement.” *Id.* at 1338. A claim for contributory infringement that “does not identify the components used in the infringing method” and does not “allege any facts adequate

² In *Achates*, the plaintiff asserted patents allegedly covering “activation” of a software product. The Court reasoned that “[i]n order to be an effective anti-piracy countermeasure, [defendant’s] software products must require that the activation step be mandatory. Therefore, it is reasonable to infer that [defendant] encourages its customers to use its software products and complete the activation step.” 2013 U.S. Dist. LEXIS 27143, at *10.

for the Court to find an inference that such components have no substantial non-infringing uses” must be dismissed. *InMotion Imagery Techs. v. Brain Damage Films*, 2:11-CV-414-JRG, 2012 WL 3283371, at *4 (E.D. Tex. Aug. 10, 2012). CCE’s FACs fail to meet either standard.

CCE’s FACs allege no facts that allow an inference or inquiry regarding use of the accused products for non-infringing purposes. Instead, CCE improperly attempts to add facts in its Opposition and incorrectly suggests that CCE can ignore the pleading requirements until “after discovery.” Opp. at 9. Moreover, CCE’s allegations that Defendants “instruct[] customers and end users” to infringe imply that the accused products *have* substantial non-infringing uses. See *U.S. Ethernet Innovations, LLC v. Digi Int’l Inc.*, No. 6:12-cv-366-MHS-JDL, 2013 U.S. Dist. LEXIS 114309 at *14 (E.D. Tex. Feb. 7, 2013). CCE ignores this, instead relying on *Achates* to suggest that contributory infringement can be inferred from “adequate facts” in the FACs “that the ... component has no other use than to perform the method steps.” Opp. at 9. In *Achates*, however, the Court was able to describe the “activation component” in question, 2013 U.S. Dist. LEXIS 27143, at *8-9; CCE’s FACs lack factual allegations describing any components.

C. CCE’s Willful Infringement Claims Should Be Dismissed

CCE argues that it can plead willful infringement by alleging direct infringement and pre-filing knowledge of the patents, and suggests that it need not allege any objectively reckless behavior.³ Opp. at 9-10. CCE is incorrect; a willfulness allegation requires an “allegation that [Defendants] acted despite an objectively high likelihood that its actions constituted infringement of a valid patent.” *Touchscreen Gestures LLC v. RIM Ltd.*, No. 6:12-cv-263, 2013 U.S. Dist. LEXIS 97080, at *5-6 (E.D. Tex. Mar. 27, 2013); *Oasis Research, LLC v. Adrive, LLC*, No. 4:10-cv-435, 2011 U.S. Dist. LEXIS 80483, at *14-15 (E.D. Tex. May 23, 2011). CCE also ignores the authority that its boilerplate language is insufficient. See Mot. at 9-11.

³ CCE does not allege willful infringement or pre-suit knowledge of the patents by Amazon.

Furthermore, CCE's allegations are insufficient even to establish pre-suit knowledge of the asserted patents, a required element of willfulness. *In re Seagate Tech., LLC*, 497 F.3d 1360, 1374 (Fed. Cir. 2007). CCE's allegations of pre-suit knowledge of the '9923, '962, '174, and '820 Patents rely almost entirely on details wholly absent from the FACs, and collectively provide only a speculative possibility that Defendants obtained knowledge of those patents.

D. CCE's Allegations of Activity Prior to Filing of the Complaints are Insufficient

One defect common to all of the inducement, contributory, and willful infringement allegations is CCE's failure to sufficiently allege pre-suit knowledge of the asserted patents. First, CCE concedes that no pre-suit knowledge of the '804 Patent was alleged. Opp. at 4. Second, CCE's argument that it alleged pre-suit knowledge of the '9923, '962, '174, and '820 Patents depends almost entirely on factual claims that were wholly absent from the FACs.⁴ In its FACs, CCE's sole allegation of pre-suit knowledge is its claim that these four patents were disclosed to "3GPP." *In its Opposition*, CCE newly dubs these patents as being "declared essential to practice a standard" and argues for the first time that Defendants "garnered pre-suit knowledge by virtue of their involvements with a standards-setting organization called the 3rd Generation Partnership Project (or '3GPP')." ⁵ Opp. at 5. *In its FACs*, however, CCE did not allege *any* facts about 3GPP (not even its full name), much less that 3GPP routinely redistributed patent disclosures to its members or that 3GPP redistributed these specific patents to these Defendants. Indeed, CCE does not even allege that Defendants are 3GPP members; it only alleges that they might be, or are "affiliated with" members. Neither Defendants nor the Court can reasonably infer that alleged disclosures of these patents to "3GPP"—an acronym with no

⁴ CCE does not allege indirect or willful infringement for the '8923 Patent.

⁵ CCE further alleges, *for the first time*, that the "3GPP solicits identification of standard essential patents," Opp. at 5, that Defendants "received actual notice of the standard essential patents at issue here," *id.*, that "it is well-known that 3GPP not only develops and publishes wireless communications standards, but actively encourages and solicits disclosure of patents essential to its work and maintains a register of such patents," *id.* at 6, and that each asserted patent "has exceptional significance to 3GPP members." *Id.*

context or explanation—resulted in Defendants acquiring actual knowledge of the patents.

CCE’s allegations in its FACs regarding the 3GPP are mere “‘naked assertions’ devoid of ‘further factual enhancement’” that are not entitled to a presumption of truth, and do not permit the “reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. 662 at 678-79 (2009) (quoting *Twombly*, 550 U.S. at 556). Accordingly, CCE’s indirect infringement and willfulness claims do not “give[] rise to anything more than a conceivable possibility of [pre-suit] knowledge” and should be dismissed. *Rembrandt Soc. Media, LP v. Facebook, Inc.*, No. 1:13-cv-158, 2013 WL 2950342, at *5 (E.D. Va. June 12, 2013). CCE cannot distinguish *Rembrandt* with factual details alleged solely in the Opposition. *See Opp.* at 5-6. But even if new facts could be properly considered, CCE’s new allegation that Defendants received “actual notice” of these four patents is based merely on Defendants’—or even more ambiguously, their affiliates’—*association* with 3GPP. CCE never actually alleges that the 3GPP or any related person or entity disclosed any of these patents to Defendants.

Because CCE alleges neither that Defendants had pre-suit knowledge of one patent, nor facts sufficient to provide more than a speculative possibility that Defendants had pre-suit knowledge of the other four, CCE’s willful and indirect infringement claims should be dismissed. At a minimum, CCE cannot recover damages for those claims allegedly accrued prior to the Complaints’ filing. *E.g., Execware LLC v. Staples Inc.*, No. 1:11-cv-00836-LPS-SRF, at *10, 12 (D. Del. Dec. 12, 2012) (slip copy) (recommendation adopted Jan. 16, 2013).

II. CONCLUSION

Defendants respectfully request that the Court dismiss CCE’s claims of indirect and willful infringement. Alternatively, Defendants respectfully request the Court rule that CCE cannot recover for any alleged damages prior to filing of the Complaints.

<p><u>/s/ Kurt M. Pankratz</u> Kurt M. Pankratz, Lead Attorney Texas Bar No. 24013291 kurt.pankratz@bakerbotts.com Roshan Mansinghani Texas Bar No. 24057026 roshan.mansinghani@bakerbotts.com</p> <p>BAKER BOTTS L.L.P. 2001 Ross Avenue, Suite 600 Dallas, Texas 75201-2980 Telephone: (214) 953-6584 Facsimile: (214) 661-4584</p> <p>ATTORNEYS FOR DEFENDANTS BLACKBERRY LIMITED AND BLACKBERRY CORPORATION</p>	<p><u>/s/ Melissa R. Smith</u> Melissa R. Smith State Bar No. 24001351 GILLAM & SMITH, LLP 303 S. Washington Ave. Marshall, TX 75670 Phone: (903) 934-8450 Fax: (903) 934-9257 melissa@gillamsmithlaw.com</p> <p>John C. Hueston (<i>pro hac vice</i>) Douglas J. Dixon (<i>pro hac vice</i>) IRELL & MANELLA LLP 840 Newport Center Dr., Ste. 840 Newport Beach, CA 92660 Phone: (949) 760-0991 Fax: (949) 760-5200 JHueston@irell.com DDixon@irell.com</p> <p>Ellisen S. Turner (<i>pro hac vice</i>) Benjamin Haber (<i>pro hac vice</i>) IRELL & MANELLA LLP 1800 Avenue of the Stars, Ste. 900 Los Angeles, CA 90067 Phone: (310) 277-1010 Fax: (310) 203-7199 ETurner@irell.com BHaber@irell.com</p> <p>ATTORNEYS FOR T-MOBILE USA, INC. AND T-MOBILE US, INC.</p>
<p><u>/s/ Alan A. Wright</u> Alan A. Wright awright@park-law.com Oluwaseun O. Ajayi oajayi@park-law.com Brendan P. O'Shea boshea@park-law.com H.C. PARK & ASSOCIATES, PLC 1894 Preston White Drive Reston, VA 20191 Telephone: (703) 288-5105 Facsimile: (703) 288-5139</p>	<p><u>/s/ Jennifer H. Doan</u> Jennifer H. Doan Texas Bar No. 08809050 Joshua R. Thane Texas Bar No. 24060713 HALTOM & DOAN Crown Executive Center, Suite 100 6500 Summerhill Road Texarkana, TX 75503 Telephone: (903) 255-1000 Facsimile: (903) 255-0800 Email: jdoan@haltomdoan.com Email: jthane@haltomdoan.com</p>

<p>Melissa R. Smith State Bar No. 24001351 GILLAM & SMITH, LLP 303 S. Washington Ave. Marshall, TX 75670 Phone: (903) 934-8450 Fax: (903) 934-9257 melissa@gillamsmithlaw.com</p> <p>ATTORNEYS FOR PANTECH CO. LTD. AND PANTECH WIRELESS, INC.</p>	<p>J. David Hadden CA Bar No. 176148 (Admitted E.D. Tex) dhadden@fenwick.com Saina Shamilov CA Bar No. 215636 (Admitted E.D. Tex) sshamilov@fenwick.com Ravi R. Ranganath CA Bar No. 272981 (Admitted E.D. Tex) rranganath@fenwick.com FENWICK & WEST LLP Silicon Valley Center 801 California Street Mountain View, California 94041 Telephone: (650) 988-8500 Facsimile: (650) 938-5200</p> <p>ATTORNEYS FOR DEFENDANT AMAZON.COM, INC.</p>
<p><u>/s/ Robert W. Weber</u> Robert W. Weber Texas State Bar No. 21044800 E-mail: bweber@smithweber.com SMITH WEBER, L.L.P. 5505 Plaza Drive -- P.O. Box 6167 Texarkana, TX 75505-6167 TEL: 903-223-5656 FAX: 903-223-5652</p> <p>And</p> <p>Mark McGrory (pro hac vice) ROUSE HENDRICKS GERMAN MAY PC 1201 Walnut, 20th Floor Kansas City, MO 64106 TEL: 816-471-7700 FAX: 816-471-2221 E-mail: MarkM@rhgm.com</p> <p>ATTORNEYS FOR DEFENDANTS SPRINT SOLUTIONS, INC.; SPRINT SPECTRUM L.P.; and BOOST MOBILE, LLC</p>	<p><u>/s/ Jamie B. Beaber</u> Jamie B. Beaber (D.C. Bar No. 484186) Kfir B. Levy (D.C. Bar No. 989212) Michael W. Maas (D.C. Bar No. 493685) Harry Hyunho Park (D.C. Bar No. 1001724) STEPTOE & JOHNSON LLP 1330 Connecticut Ave., NW Washington, DC 20036 Telephone: (202) 429-6286 Facsimile: (202) 429-3902 jbeaber@steptoe.com klevy@steptoe.com mmaas@steptoe.com hpark@steptoe.com</p> <p>Robert G. Pluta (IL Bar No. 6278255) STEPTOE & JOHNSON LLP 115 S. LaSalle Street, Suite 3100 Chicago, IL 60611 Telephone: (312) 577-1227 Facsimile: (312) 577-1370 rpluta@steptoe.com</p> <p><u>/s/ Michael E. Jones</u> Michael E. Jones State Bar No. 10929400</p>

	<p>mikejones@potterminton.com Allen F. Gardner State Bar No. 24043679 allengardner@potterminton.com POTTER MINTON P.C. 110 N. College Avenue, Suite 500 Tyler, Texas 75702 Telephone: (903) 597-8311 Facsimile: (903) 593-0846</p> <p>ATTORNEYS FOR DEFENDANTS LG ELECTRONICS, INC. AND LG ELECTRONICS U.S.A., INC.</p>
<p><u>/s/ Everett Upshaw</u> Everett Upshaw Texas Bar No.: 24025690 LAW OFFICE OF EVERETT UPSHAW, PLLC 811 S. Central Expressway, Suite 307 Richardson, TX 75080 P: 214.680.6005 F: 214.865.6086 everettupshaw@everettupshaw.com</p> <p>ATTORNEY FOR DEFENDANT ZTE (USA) INC.</p>	<p><u>/s/ Michael E. Jones</u> Michael E. Jones State Bar No. 10929400 Patrick C. Clutter, IV State Bar No. 24036374 mikejones@potterminton.com patrickclutter@potterminton.com Potter Minton, P.C. 110 N. College Ave., Suite 500 Tyler, Texas 75702 Tel: (903) 597-8311 Fax: (903) 593-0846</p> <p>Charles B. Molster, III Virginia State Bar No. 23613 Thomas M. Dunham D.C. Bar No. 448407 Corrine M. Saylor D.C. Bar No. 997638 (<i>Pro Hac Vice</i>) cmolster@winston.com tdunham@winston.com csaylor@winston.com WINSTON & STRAWN LLP 1700 K Street, N.W. Washington, D.C. 20006-3817 Tel: (202) 282-5000 Fax: (202) 282-5100</p> <p>ATTORNEYS FOR CELLCO PARTNERSHIP D/B/A/ VERIZON WIRELESS</p>
<u>/s/ Robert W. Busby</u>	<u>/s/ Inge Larish</u>

<p>Rick L. Rambo Texas State Bar No. 00791479 rrambo@morganlewis.com Adam A. Allgood Texas State Bar No. 24059403 aallgood@morganlewis.com 1000 Louisiana Street, Suite 4000 Houston, Texas 77002 (713) 890-5000 Telephone (713) 890-5001 Facsimile</p> <p>Robert W. Busby, LEAD ATTORNEY Virginia Bar No. 41312 (Pro Hac Vice) rbusby@morganlewis.com John D. Zele Virginia Bar No. 36183 (Pro Hac Vice) jzele@morganlewis.com Jeremy D. Peterson Virginia Bar No. 36183 (Pro Hac Vice) jpeterson@morganlewis.com Bradford A. Cangro (Admitted in TXED) D.C. Bar No. 495996 bcangro@morganlewis.com MORGAN, LEWIS & BOCKIUS LLP 1111 Pennsylvania Avenue, NW Washington, DC 20004 (202) 739-3000 Telephone (202) 739-3001 Facsimile</p> <p>COUNSEL FOR DEFENDANTS NEC CORPORATION OF AMERICA, NEC CASIO MOBILE COMMUNICATIONS, LTD. AND AT&T MOBILITY LLC</p>	<p>Inge Larish inge.larish@pillsburylaw.com TX State Bar No. 00796924 Steven A. Moore (<i>pro hac vice</i> pending) steve.moore@pillsburylaw.com California State Bar No. 232114 Nicole S. Cunningham (<i>pro hac vice</i> pending) nicole.cunningham@pillsburylaw.com California State Bar No. 234390 PILLSBURY WINTHROP SHAW PITTMAN LLP 501 West Broadway, Suite 1100 San Diego, CA 92101 Phone: 619.544.3119 Fax: 619-236-1995</p> <p>ATTORNEYS FOR DEFENDANTS HTC CORPORATION AND HTC AMERICA, INC.</p>
<p><u>/s/ Christopher W. Kennerly</u> Christopher W. Kennerly TX Bar No. 00795077 chriskennerly@paulhastings.com Jeffrey G. Randall CA Bar No. 130811 jeffrandall@paulhastings.com Paul Hastings LLP 1117 S. California Ave. Palo Alto, CA 94304-1106 Telephone: (650) 320-1800 Facsimile: (650) 320-1900</p>	

S. Christian Platt
CA Bar No. 199318
christianplatt@paulhastings.com
Paul Hastings LLP
4747 Executive Drive
Twelfth Floor
San Diego, CA 92121-3114
Telephone: (858) 458-3034
Facsimile: (858) 458-3134

**COUNSEL FOR DEFENDANT AT&T
MOBILITY LLC**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically in compliance with Local Rule CV-5 on this 5th day of May, 2014. As of this date all counsel of record have consented to electronic service and are being served with a copy of this document through the Court's CM/ECF system under Local Rule CV-5(a)(3)(A).

/s/ Christopher W. Kennerly
Christopher W. Kennerly